APPENDIX "A".

The Opinion of the Court of Appeals of Kentucky, Delivered April 25, 1958 through Judge Montgomery.

Rendered April 25, 1958.

COURT OF APPEALS OF KENTUCKY.

CLARENCE E. HODGES, APPELLANT,

V.

JOE F. HODGES, SUCCESSOR TO CARL E. JORDAN, SHERIFF, ET AL., APPELLEES.

JAMES B. SEARCY, APPELLANT,

V.

JOE F. HODGES, SUCCESSOR TO CARL E. JORDAN, SHERIFF, ET AL., APPELLEES.

J. T. FLOWERS, APPELLANT,

V.

CARL E. JORDAN, SHERIFF, ET AL. APPELLEES.

TOM FRIEDLI, APPELLANT,

V.

CARL E. JORDAN, SHERIFF, ET AL., APPELLEES.

APPEALS FROM WARREN CIRCUIT COURT.
HONORABLE JOHN B. RODES, JUDGE.

Opinion of the Court by Judge Montgomery.

AFFIRMING

These appeals are from a judgment dismissing the actions of appellants contesting the results of local option elections in Bowling Green and in Warren County. The

elections were held on September 17, 1957, and resulted in majorities of 200 votes in the city and 1,849 votes in the county in favor of prohibition.

Clarence E. Hodges and James B. Searcy filed separate actions on October 10, 1957, the former contesting the result of the city election and the latter, the county election. J. T. Flowers and Tom Friedli also filed separate actions on October 17, 1957, contesting the city election and county election, respectively. The grounds of contest in all the cases are essentially the same. It is alleged that illegal votes were cast by: (1) persons not signing the comparative signature books; (2) persons actually registered but who should have been purged; (3) persons of improper age; (4) persons residing elsewhere than in Bowling Green or Warren County, or who had not resided the required length of time in the precincts in which they voted; (5) persons physically handicapped who voted elsewhere than in the presence of the election officers; and (6) persons so intimidated and coerced that they failed to vote according to their own free will. In addition, it was alleged that the election officers in certain named precincts failed to take or subscribe to the prescribed oath and ballots were not signed. None of the petitions allege the names of the illegal voters. There was no allegation that the votes cast by illegal voters would have affected the election results. Each complaint asked a judgment declaring that no valid election was held.

On October 22, 1957, appellees in each case moved to dismiss for failure to state a cause of action and to strike each paragraph for failure to name the alleged illegal voters. On October 24, 1957, the motions were heard together. The motions to dismiss were sustained and the petitions were dismissed for failure to state a cause of action, in that the names of the illegal voters were not alleged. It

was further held that the requirements concerning the duties of the election officers and the sanctity of the polling areas, if violated, were directory only and not mandatory.

The appellants requested, and were granted, until November 1, 1957, in which to amend. Amended petitions were tendered on October 31, 1957. Friedli and Flowers incorporated the names of alleged illegal voters in their amended pleadings, while Hodges and Searcy attached their lists as appendices. The amended pleadings were overruled and the petitions were dismissed on November 8, 1957. The trial court gave as the reason for denying the filing of the amended petitions that they were attempts to set out new and additional causes of action as prohibited by KRS 122.070.

The Searcy and Hodges cases have been consolidated, as have the Flowers and Friedli cases. The appeals are considered together since common questions are determinative. Two fundamental propositions are presented: (1) whether the petitions stated good causes of action; and (2) whether the amended pleadings should have been filed.

The result of a local option election may be contested in the same manner as provided for a contest of a general election under KRS 122.070 through 122.100. KRS 242.120; *Widick* v. *Ralston*, 303 Ky. 373, 197 S.W. 2d 261. The procedure for the contest of a general election, as provided in KRS 122.070, is in part as follows:

> "The petition shall be filed and process issued within thirty days after the day of election; it shall state the grounds of the contest relied on, and no other grounds shall afterwards be relied upon."

The established rule is that where the casting of ineligible or illegal votes constitutes a ground of contest, the

pleader must name in the pleadings those persons whose votes are questioned. *Gross* v. *West*, Ky., 283 S.W. 2d 358; *Stieritz* v. *Kaufman*, 314 Ky. 10, 234 S.W. 2d 145; *Johnson* v. *May*, 305 Ky. 292, 203 S.W. 2d 37; *Widick* v. *Ralston*, 303 Ky. 373, 197 S.W. 2d 261; 303 Ky. 395, 198 S.W. 2d 56; *Karloftis* v. *Helton*, 297 Ky. 463, 178 S.W. 2d 959; certiorari denied 322 U.S. 713, 64 S. Ct. 1269, 88 L. Ed. 1555; *Jackson* v. *Bolt*, 292 Ky. 503, 166 S.W. 2d 831; *Hogg* v. *Caudill*, 254 Ky. 409, 71 S.W. 2d 1020.

Appellants attack this rule and insist that since the adoption of the Civil Rules of Practice and Procedure it should no longer be necessary to name the illegal voters in order to state a good cause of action in an election contest. In support of their position, they cite CR 8.01, providing that "A pleading * * * shall contain * * * a short and plain statement of the claim showing that the pleader is entitled to relief * * *," and CR 8.05, providing that "Each averment * * * shall be simple, concise, and direct. No technical forms * * * are required." It is insisted that the established rule is contrary in spirit and substance to the Civil Rules and the contention has support in *Lunsford* v. *Culton*, 15 Ky. Law Rep. 504, 23 S.W. 946; *Tunks* v. *Vincent*, 106 Ky. 829, 51 S.W. 622; and *Weller* v. *Muenninghoff*, 155 Ky. 77, 159 S.W. 632.

In those cases, the grounds of election contests were stated generally and without stating the names of questioned voters. In each of those cases, no objection seems to have been made and the contests were determined without the pleadings having been made more specific. However, this situation was noted and those cases are not authority in support of the liberal rule of pleading contended for by appellants.

The rule that prevailed in such cases was stated in the Lunsford case and quoted in *Francis* v. *Sturgill*, 163 Ky. 650, 174 S.W. 753, as:

> "A notice of a contest because of illegal votes being cast for the one party or the other, while it should be required to be made more definite, if objection is made in proper time, is sufficient if parties see proper to make an issue without objection, and proceed to investigate the case."

The rule also was approved in *Siler* v. *Brown*, 215 Ky. 199, 284 S.W. 997.

In none of the early cases did the Court lose sight of the requirement that the names of the illegal voters should be stated, but the attitude was expressed in the Siler case, thus: "* * * if these parties were content to prepare and try this case in this indefinite form, they had a right to do so." Each of the cases recognized, as was held in the instant cases, that upon proper objection the names must be alleged and that a failure to allege in proper time renders the pleading defective. The Francis case was quite similar in many aspects to the present cases, and the same rule prevailed then. Thus, the requirement that the illegal voters shall be named has become a fundamental rule controlling the pleadings in an election contest proceeding.

The initial rule of the Civil Rules expressly excludes the "* * * procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict * * *" from the application of the rules, including CR 8. It, therefore, is concluded that the established rule has become so firmly embedded as a part of the election contest procedure provided by statute that it is excluded from the application of CR 8.

Other cases relied on by appellants are distinguishable. In *Herald* v. *Turner*, 237 Ky. 827, 36 S.W. 2d 623, the sole ground of contest concerned the alteration of a certificate by the precinct officers. *Taylor* v. *Neutzel*, 220 Ky. 510, 295 S.W. 873, dealt with a fraudulent conspiracy and actual or threatened violence. The recent cases of *Crowe* v. *Emmert*, Ky., 305 S.W. 2d 272, and *Ragan* v. *Burnett*, Ky., 305 S.W. 2d 759, are urged as authority for excusing the failure to name the voters. Both cases concerned violations of the statute granting the privilege of voting to absentees. The basis of the decisions in those cases was that the separate class of absentee votes was so infected with illegality from a failure to oberve the mandatory provisions of the statute common to all such votes, the elective force of those votes could not reasonably be determined. *Warren* v. *Rayburn*, Ky., 267 S.W. 2d 720. Additionally, in the Crowe case, the names of the questioned voters were alleged. An election contest based on a violation of the Corrupt Practices Act is similar. *Goad* v. *Jackson*, 270 Ky. 92, 109 S.W. 2d 17.

The entire election was challenged because of the alleged irregularities concerning the officers' oath, signature books, failure to sign ballots, and intimidation. The general rule is that an election will not be invalidated or voters deprived of their right of suffrage by mere irregularities which do not affect the fairness and equality of the election. *Burchell* v. *Smith*, Ky., 262 S.W. 2d 365, and collected cases therein.

The failure of election officers to subscribe to the oath has been held insufficient to invalidate an election. *Smith* v. *Combs*, 310 Ky. 755, 221 S.W. 2d 672; *Schaffield* v. *Hebel*, 301 Ky. 358, 192 S.W. 2d 84; *Pratt* v. *Breckinridge*, 112 Ky. 1, 65 S.W. 136. See also 18 Am. Jur., Elections, Section 38, page 205.

The petitions filed alleged that the comparative signature statute was not complied with and that the entire vote should be discarded. The manner or extent of noncompliance was not alleged. Reliance is placed on *Gross v. Helton*, Ky., 267 S.W. 2d 67, wherein it was held that compliance with this statute is mandatory. Also see *Wilkinson v. Queen*, Ky., 269 S.W. 2d 223, and Ky., 274 S.W. 2d 487. An examination of the record in the Gross case shows that the names of the offending voters were alleged; consequently, the question here raised was not presented. The petitions here involved contain no allegations as to names or numbers of voters or percentages of illegal votes. The failure to sign the comparative signature book renders the voter ineligible to vote, but it does not relieve the contestant of the necessity of alleging the name, as in any other case of ineligibility. The same conclusion governs the failure to sign ballots. The descriptive references in appellants' briefs to the alleged means of intimidation and coercion do not appear sufficient to have produced any so-called "brain-washing" or to have intimidated or coerced any voter. Again, the name of no voter so affected was alleged.

By amendment, appellants sought to perfect their respective causes of action. They argue that the trial court erred in denying them the right to file amendments. In summary, their arguments are: they reserved the right to amend in their original pleadings; the trial court granted leave to amend by memorandum opinion; any plaintiff has the right to amend his complaint prior to the filing of a responsive pleading; and in an election contest case, the contest petition may be amended after the contest period has expired in order to make it more definite, perfect, and certain, to correct a mistake, and in the furtherance of justice.

The original petitions were dismissed after the expiration of the period in which to state the grounds of contest prescribed by KRS 122.070. The statute specifically prohibits the reliance on any other grounds stated after the expiration of the term fixed. In view of the statutory prohibition, the time to state grounds of contest cannot be extended by reservation of party or by permission of the court. Neither has any authority to enlarge the period fixed by the General Assembly. The statute overrides CR 15.01, when the statutory period has expired. CR 1.

The petitions were dismissed for failure to state a cause of action. Without the names of the voters, no cause of action was stated. The addition of the names by amendment, in effect, would be stating a cause of action for the first time. The statute contemplates that a good cause of action shall be stated within the prescribed period. Unless a good cause of action has been stated in the 30-day period, the petition cannot be revitalized by amendment thereafter. Each of the authorities cited by appellants recognizes that a new or additional ground of contest may not be asserted after the statutory period has expired. There is no quarrel with the authorities cited by appellants insofar as they permitted an amendment to a petition which stated a good cause of action in order to make allegations more definite, to correct a mistake, or in the furtherance of justice. The trial court was correct in refusing to permit the filing of amendments.

Appellees complain that the trial court stayed the effective date of prohibition, pending the final determination of the appeals. No cross-appeal was taken from the ruling, and its correctness will not be considered at this time.

Judgment affirmed.

Attorneys for Appellants:

Leland H. Logan,
Bowling Green, Kentucky,

Cleon K. Calvert,
Pineville, Kentucky,

} For Clarence E. Hodges and James B. Searcy.

August Winkenhofer, Jr.,
Cook Building,
Bowling Green, Kentucky,

Farnsley, Hottell & Stephenson,
Lincoln Bank Building,
Louisville, Kentucky,

} For J. T. Flowers and Tom Friedli.

Attorneys for Appellees:

Parker W. Duncan,
Duncan & Huddleston,
1032 College Street,
Bowling Green, Kentucky.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS. . . . . SCT.

I, Doris Owens, Clerk of the Court of Appeals certify that the foregoing is a correct copy of the opinion delivered by the Court of Appeals in an appeal therein pending styled Clarence E. Hodges vs. Hodges, Successor to Carl E. Jordan, Sheriff, et al., Appellees, and consolidated actions, appeal from the Warren Circuit Court, as same appears from the records and files of my Office.

Witness my hand and seal of Office this the 30th day of July, 1958.

/s/ Doris Owens,
Clerk of the Court of Appeals of Kentucky.

(Seal)

APPENDIX "B."

-a- The Mandate of the Court of Appeals of Kentucky, issued and sent down June 20, 1958, in the Hodges case.

-b- The Mandate of the Court of Appeals of Kentucky, issued and sent down June 20, 1958, in the Searcy case.

Mandate.

THE COMMONWEALTH OF KENTUCKY,
THE COURT OF APPEALS

Spring Term, June 20, 1958

Clarence E. Hodges
vs.
Joe F. Hodges, Successor to Carl E. Jordan, Sheriff, Et Al.

} Appeal from a judgment of the Warren Circuit Court.

The Court being sufficiently advised, the motion of appellant for a stay of issuance of mandate, pending application to the Supreme Court of the United States for a Petition for a Writ of Certiorari, is overruled, and the mandate directed to issue forthwith and shall read as follows:

"The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said Court.

The mandate is ordered to issue forthwith putting in effect prohibition in Warren County, provided that the operation of the mandate shall be suspended for sixty (60) days insofar as it affects the rights of plaintiffs and other

lawful dealers, distributors, or wholesalers similarly situated, to liquidate and dispose of their alcoholic beverage stocks and business according to law, by sale or transfer under supervision of proper authorities to distillers, wholesalers, distributors, dealers or other persons licensed to deal in alcoholic beverages.

It is further considered that the appellees recover of the appellant their cost herein expended."

A copy—Attest:

Doris Owens, C. C. A.
By /s/ Edward K. Bryan, D. C.

Issued June 20, 1958.

"A"

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS. . . . . SCT.

I, Doris Owens, Clerk of the Court of Appeals, certify that the foregoing is true and correct copy of Mandate issued on June 20, 1958, by the Court of Appeals, in an appeal therein pending styled Clarence E. Hodges, Appellant, vs. Joe F. Hodges, Successor to Carl E. Jordan, Sheriff, et al., Appellees, in appeal from the Warren Circuit Court, as same appears from the records and files of my Office.

Witness my hand and seal of Office this the 30th day of July, 1958.

/s/ Doris Owens,
Clerk of the Court of Appeals of Kentucky.

(Seal)

Mandate.

THE COMMONWEALTH OF KENTUCKY,
THE COURT OF APPEALS

Spring Term, June 20, 1958

James B. Searcy
vs.
Joe F. Hodges, Successor to Carl E. Jordan, Sheriff, Et Al.

} Appeal from a judgment of the Warren Circuit Court.

The Court being sufficiently advised, the motion of appellant for a stay of issuance of mandate, pending application to the Supreme Court of the United States for a Petition for a Writ of Certiorari, is overruled, and the mandate directed to issue forthwith and shall read as follows:

"The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said Court.

The mandate is ordered to issue forthwith putting in effect prohibition in Warren County provided that the operation of the mandate shall be suspended for sixty (60) days insofar as it affects the rights of plaintiffs and other lawful dealers, distributors, or wholesalers similarly situated, to liquidate and dispose of their alcoholic beverage stocks and business according to law, by sale or transfer under supervision of proper authorities to distillers, wholesalers, distributors, dealers or other persons licensed to deal in alcoholic beverages.

It is further considered that the appellees recover of the appellant their cost herein expended."

A copy—Attest:

Doris Owens, C. C. A.
By /s/ Edward K. Bryan, D. C.

Issued June 20, 1958.

"B".

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS. . . . . SCT.

I, Doris Owens, Clerk of the Court of Appeals, certify that the foregoing is true and correct copy of Mandate issued on June 20, 1958, by the Court of Appeals, in an appeal therein pending styled James B. Searcy, Appellant, vs. Joe F. Hodges, Successor to Carl E. Jordan, Sheriff, et al., Appellees, in appeal from the Warren Circuit Court, as same appears from the records and files of my Office.

Witness my hand and seal of Office this the 30th day of July, 1958.

/s/ Doris Owens,
Clerk of the Court of Appeals
of Kentucky.

(Seal)

APPENDIX "C".

The step sheets of the Court of Appeals of Kentucky showing the steps taken in these cases in that Court.

Supersedeas Bond.

CONSOLIDATED

page 1.

FILE No. F-105-57

CLARENCE E. HODGES ($2.70 opinion)
REQUIRED TO BE ADVANCED
KRS 122.090

2nd Dist.

(Supersedeas bond on page 74 of Record)

LOCAL OPTION ELECTION CASE

CARL E. JORDAN, SHERIFF, ET AL.,

APPELLEE	APPELLANT
Trans.	Trans. .....
C. C. A. 9.75	C. C. A., 8.60
Atty. 10.00	Atty. .....
Fee Book No. 43	Page 67

1 vol. ($98.50)

cash

Nov. 26, 1957 Filed. Tax Paid. Appeal by notice.
Attest: Doris Owens C. C. A. By
_____ D.C.

December 2, 1957	Appellees filed notice and motion to consolidate with appeal Searcy vs. Jordan, Sheriff, Et Al.
December 2, 1957	Appellees filed notice and motion that appellants be required to file briefs on or before Dec. 9, 1957, and appellees required to file brief on or before Dec. 16, 1957.
December 3, 1957	Appellant filed response and notice to appellees motion to fix time for filing of briefs.
December 3, 1957	Appellees' motion to consolidate appeal with Searcy vs. Jordan, etc., Sustained, JRM-shr, 12-3-57
December 3, 1957	Appellees' motion that appellants be required to file briefs on or before Dec. 9, 1957, and appellees be required to file brief on or before Dec. 16, 1957, Sustained. Appellants Granted Time to file brief to Dec. 27, 1957 and appellees granted to Jan. 10, 1958. JRM-shr, 12-3-57.
December 23, 1957	Appellants filed briefs and notice.
January 3, 1958	Appellees filed briefs and notice.
Jan. 6, 1958	SUBMITTED
Jan. 10, 1958	Appellant filed notice & motion for Oral Argument.
Jan. 21, 1958	Appellant's motion for Oral Argument. Passed to Merits. JRM-shr.

March 3, 1958 — Appellant filed notice & motion that Joe F. Hodges, new elected sheriff, be substituted as appellee. Motion Sustained 3/13/58.

Warren County.
Judge John B. Rodes
Bowling Green, Ky.
Judge.

Leland H. Logan,
Bowling Green, Ky.
Cleon K. Calvert,
Pineville, Ky.
Attorney for Appellant.

Parker Duncan,
Bowling Green, Ky.,
(1032 College St.,)
Attorney for Appellee.

Supersedeas Bond.

PAGE 2

FILE No. F-105-57

CLARENCE E. HODGES

CONSOLIDATED

(Supersedeas bond on page 74 of record)

2nd Dist.

vs. Transcript

JOE F. HODGES, SUCCESSOR TO CARL E. JORDAN, SHERIFF, ET AL.

APPELLEE	APPELLANT
Trans.	Trans.
C. C. A.	C. C. A.
Atty.	Atty.
Fee Book No.	Page

	AFFIRMED	D.C.
APRIL 25, 1958		
April 29, 1958	Appellants filed notice, affidavit and motion for usual 30 days to file petition for rehearing.	
April 30, 1958	Appellees filed notice, memorandum and motion for mandate to issue forthwith.	
May 9, 1958	Appellants filed response and notice to motion for immediate issue of the mandate.	
May 13, 1958	Appellees motion for mandate to issue forthwith Overruled. JRM-shr, 5-13-58.	
May 21, 1958	Appellant filed Petition for Rehearing and notice.	
May 22, 1958	Appellant filed notice & motion for oral argument on Petition for Rehearing.	
May 22, 1958	Appellant's motion for oral argument on Petition for Rehearing. Overruled. JRM-shr.	
June 4, 1958	Appellees filed response and notice to Petition for Rehearing.	
June 16, 1958	Appellants filed notice & motion to reconsider and revoke order overruling motion for oral argument on Petition and for order sustaining motion. Motion Overruled 6/16 58.	
June 20, 1958	Petition for Rehearing Overruled. (Opinion Extended on Its Face).	
June 20, 1958	Appellant filed notice & motion to stay issuance of mandate pending application for Writ of Certiorari to Supreme Court of United States.	

June 20, 1958 — Appellant filed notice & motion for leave to withdraw Record by leaving certified copy of same in Clerk's Office, same to be used on Application for Writ of Certiorari to Supreme Court of United States.

Warren County.
Judge John B. Rodes
Bowling Green, Ky.
Judge.

Leland H. Logan,
Bowling Green, Ky.
Cleon K. Calvert,
Pineville, Ky.
Attorney for Appellant.

Parker Duncan,
Bowling Green, Ky.,
Attorney for Appellee.

Supersedeas Bond.

PAGE 3

FILE No. F-105-57

CLARENCE E. HODGES

CONSOLIDATED ACTIONS
2nd Dist.

vs. Transcript

(Supersedeas bond on page 74 of record)

JOE F. HODGES, SUCCESSOR TO CARL E. JORDAN, SHERIFF, ET AL.

APPELLEE	APPELLANT
Trans.	Trans.
C. C. A.	C. C. A.

Atty. ..... Atty. .....
Fee Book No. ..... Page .....

D.C.

June 20, 1958 — Appellant's motion to stay issuance of mandate (45) days pending application to Supreme Court of U. S. for Writ of Certiorari Overruled, mandate ordered to issue with certain changes, JRM-shr, 6/20/58.

June 20, 1958 — Appellant's motion for leave to withdraw record, by leaving certified copy in the Clerk's Office, same to be used on application for Writ of Certiorari to Supreme Court of United States, Sustained, and it is so ordered. JRM-shr, 6/20/58

June 24, 1958 — Appellant filed notice & motion to recall mandate issued herein on June 20, 1958, and to correct and reform said mandate.

July 8, 1958 — Appellants' motion to recall, correct and reform mandate Overruled. By Chief Justice Moremen, (see order in record).

Warren County.
Judge John B. Rodes
Bowling Green, Ky.,
Judge

Leland H. Logan,
Bowling Green, Ky.
Cleon K. Calvert,
Pineville, Ky.
Attorney for Appellant.

Parker Duncan,
Bowling Green, Ky.,
(1032 College St.)
Attorney for Appellee.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS. . . . . SCT.

I, Doris Owens, Clerk of the Court of Appeals, certify that the foregoing three (3) pages is a correct copy of the steps taken in the Court of Appeals, in an appeal therein pending styled, Clarence E. Hodges, Appellant, vs. Joe F. Hodges, Successor to Carl E. Jordan, Sheriff, et al., Appellees, appeal from the Warren Circuit Court, as same appears from the records and files of my Office.

Witness my hand and seal of Office this the 30th day of July, 1958.

/s/ Doris Owens

(Seal) Clerk of the Court of Appeals of Kentucky.